RECEIVED
MAR 19 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80 - 6367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Supreme Court, U.S.
FILED
MAR 17 1981
Alexander L. Stevas, Clerk

NO. _____

LINWOOD EARL BRILEY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

FRANK N. COWAN
COWAN, OWEN & NANCE
P. O. Box 3205
Richmond, Virginia 23235

DEBORAH S. O'TOOLE
COWAN, OWEN & NANCE
P. O. Box 3205
Richmond, Virginia 23235

March 17, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

LINWOOD EARL BRILEY, Petitioner

v.

COMMONWEALTH OF VIRGINIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

The petitioner, Linwood Earl Briley, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Virginia entered in this proceeding on November 26, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. ARE THE VIRGINIA STATUTES WHICH PROVIDE THAT MURDER WHICH OCCURS DURING THE COMMISSION OF A ROBBERY CAN BE CAPITAL MURDER OR FIRST DEGREE MURDER AN UNCONSTITUTIONAL VIOLATION OF A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW BECAUSE THEY FAIL TO PROVIDE A MEANINGFUL BASIS TO DISTINGUISH BETWEEN THE FEW CASES IN WHICH CAPITAL PUNISHMENT IS INVOKED AND THE MANY IN WHICH IT IS NOT?

2. IS THE FAILURE TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION IN A CAPITAL MURDER CASE A VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW.....	i
TABLE OF AUTHORITIES.....	iii, iv
OPINION BELOW.....	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1-3
STATEMENT OF THE CASE.....	3-5
RAISING OF FEDERAL QUESTIONS.....	5-7
REASONS FOR GRANTING THE WRIT.....	7-15
CONCLUSION.....	15
CERTIFICATE OF MAILING.....	15

APPENDIX

A. OPINION OF SUPREME COURT OF VIRGINIA

B. ORDER AFFIRMING JUDGMENT OF TRIAL COURT

C. ORDER DENYING REHEARING

D. ORDER GRANTING STAY OF EXECUTION OF JUDGMENT

E. PORTIONS OF RECORD FROM TRIAL COURT INCLUDED IN JOINT APPENDIX ON APPEAL TO SUPREME COURT OF VIRGINIA WHEREIN FEDERAL QUESTIONS WERE RAISED

F. PETITION FOR REHEARING IN THE SUPREME COURT OF VIRGINIA

G. BRIEF OF APPELLANT FILED IN THE SUPREME COURT OF VIRGINIA

TABLE OF AUTHORITIES

Page

CONSTITUTIONS

U. S. Const. Amend. V 1

U. S. Const. Amend. XIV, Section 1. 1

STATUTES

28 U.S.C. §1257 (3). 1

Va. Code Ann. §18.2-18 (Cum. Supp. 1980) 2

Va. Code Ann. §18.2-31 (Cum. Supp. 1980) 2

Va. Code Ann. §18.2-32 (Cum. Supp. 1980) 2

Va. Code Ann. §19.2-264.3 (Cum. Supp. 1980). 3

Va. Code Ann. §19.2-264.4 (Cum. Supp. 1980). 10

CASES

Beck v. Alabama,
US , 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980). 8, 13

Furman v. Georgia,
408 US 238, 33 L.Ed. 2d 346, 92 S. Ct. 2726 (1972). . 7

Godfrey v. Georgia,
US , 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980). 7, 13

Gregg v. Georgia,
428 US 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) . 7

Jurek v. Texas,
428 US 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976) . 7

Keeble v. United States,
412 US 205, 36 L. Ed. 2d 844, 93 S. Ct. 1993 (1973) . 14

Profitt v. Florida,
428 US 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976) . 7

Ball v. Commonwealth,
221 Va. , 273 S.E.2d 790 (1981). 8

Belton v. Commonwealth,
200 Va. 5, 9, 104 S.E.2d 1, 4 (1958). 12

Briley v. Commonwealth,
221 Va. , 273 S.E.2d 48 (1980) 12

Clark v. Commonwealth,
219 Va. 237, 257 S.E.2d 784 (1978). 7

Coppola v. Commonwealth,
220 Va. 243, 257 S.E.2d 797 (1979). 7

Haskell, et al v. Commonwealth,
218 Va. 1033, 243 S.E.2d 477 (1980) 12

Johnson v. Commonwealth,
221 Va. , 273 S.E.2d (1980). 9

CASES

Page

Mason v. Commonwealth,
200 Va. 253, 105 S.E.2d 149 (1958). 13

Mason v. Commonwealth,
219 Va. 1091, 254 S.E.2d 290 (1975) 7

McClung v. Commonwealth,
215 Va. 654, 212 S.E.2d 290 (1975). 12

Painter v. Commonwealth,
210 Va. 360, 171 S.E.2d 166 (1969). 12

Smith v. Commonwealth,
219 Va. 455, 248 S.E.2d 125 (1978). 7

Stamper v. Commonwealth,
220 Va. 260, 257 S.E.2d 808 (1979). 7

Waye v. Commonwealth,
219 Va. 683, 251 S.E.2d 202 (1979). 7

OPINION BELOW

The opinion of the Supreme Court of Virginia, 221 Va. 273 S.E.2d 48 (1980) appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on November 26, 1980. A timely petition for rehearing was denied on January 16, 1981, and this Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 USC §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code Annotated §18.2-31 (Cum. Supp. 1980). Capital murder, defined; punishment. - The following offenses shall constitute capital murder, punishable as a Class 1 felony: ...

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in §18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution as defined in §53-19.18, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape; and

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in §9-108.1 H when such killing is for the purpose of interfering with the performance of his official duties.

Virginia Code Annotated §18.2-32 (Cum. Supp. 1980). First and second degree murder defined; punishment. - Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing or in the commission of or attempt to commit, arson, rape, robbery, burglary, or abduction, except as provided in §18.2-31, is murder of the first degree, punishable as a Class 2 felony...

Virginia Code Annotated §18.2-18 (Cum. Supp. 1980). How principals in second degree and accessories before the fact punished. - In the case of every felony, every principal in the

second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as of a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of §18.2-31(b) an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.

STATEMENT OF THE CASE

This case arises out of the death of John Harvey Gallaher (Gallaher) whose body was discovered in the James River at Mayo Island on September 16, 1979. He had been shot once in the back. Mayo Island is located between the north and south banks of the James River near the 14th Street Bridge in Richmond, Virginia.

On October 22, 1979, Linwood Briley was arrested on information supplied by Duncan Eric Meekins (Meekins), a juvenile who was already in custody after his arrest on another charge.

On December 10, 1979, the grand jury for the Circuit Court of the City of Richmond, Division II returned indictments against Linwood Earl Briley (hereinafter referred to as Briley or defendant) charging him with capital murder of John Harvey Gallaher, robbery, abduction and three counts of use of a firearm in the commission of a felony. A trial was scheduled for February 19, 1980. Due to procedural problems not relevant here, Briley was reindicted on February 14, 1980 in the Circuit Court for the City of Richmond, Division I.

A jury was impanelled and the defendant was tried in that court on the charges of capital murder of Gallaher (murder during the commission of a robbery - Code §18.2-31(d)) and the use of a firearm in the commission of a felony. On February 21, 1980, the jury returned a verdict of guilty against the defendant on both charges.

Pursuant to the provisions of §19.2-264.3 of the Code of Virginia, the second stage of the trial on the capital murder charge commenced on February 22, 1980. The jury recommended that the defendant be put to death for the capital murder of Gallaher.

On March 10, 1980, the trial court sentenced the defendant to be put to death for the capital murder of Gallaher and further sentenced the defendant to serve one (1) year in the Virginia State Penitentiary for the conviction of the use of a firearm in the commission of a felony.

The convictions were appealed to the Supreme Court of Virginia citing eleven (11) questions of law presented for review by the Court. On November 26, 1980, the appeal was denied and the judgment and sentence were affirmed. A rehearing was denied on January 16, 1981.

The defendant denies and denied from the beginning that he was involved in any way in the murder of John Harvey Gallaher. However, based upon applicable principles of law that the facts must be stated in a light most favorable to the prevailing party, the following statement of fact is presented.

Gallaher was a disc jockey for radio station WXGI in Richmond, Virginia. He also played in a small band at the Log Cabin nightclub located on Jefferson Davis Highway in Richmond. On September 14, 1979, Gallaher was playing with the band at the Log Cabin. At about 11:20 p.m. he went out the back door of the Log Cabin to relieve himself. He walked over to some bushes near an alley behind the Log Cabin. Briley, Meekins and Briley's brothers, James and Anthony, were behind the bushes. Meekins and Briley came from behind the bushes with a rifle and a sawed-off shotgun and ordered Gallaher to lie on the ground. Briley took Gallaher's billfold and car keys and then Meekins and Briley went to look for Gallaher's car. Anthony Briley stayed with Gallaher while Linwood Briley and Meekins went to get Gallaher's car. Briley and Meekins came back without finding the car. Briley then sent Meekins to search for the car. While Meekins was gone, Briley took Gallaher's ring and watch. When Meekins brought Gallaher's car around to where Briley and his brothers were holding Gallaher, Meekins and Briley put Gallaher into the

back seat of Gallaher's car. Meekins got in with Gallaher, and Briley got in the front seat and drove the car away. Briley's brothers got in Anthony's car in which they all had been riding. After driving around for awhile in two separate cars, Briley's brothers parked Anthony's car and got into the car with Briley, Meekins, and Gallaher. Briley drove the car to Mayo Island and drove behind a paper company located on the island. Briley and Meekins pulled Gallaher out of the car. As Gallaher was standing up, Briley shot Gallaher once in the back. Gallaher died instantly. Briley got back into the car and he, Meekins and his brothers drove away. After driving around for awhile, Briley parked the car and he, Meekins and his brothers stripped equipment from the car. The Brileys and Meekins divided Gallaher's money and property between them. Several weeks later while Duncan Meekins was being questioned by the police on other criminal charges, he supplied the evidence which led to Linwood Briley's arrest and the charge of capital murder being made against Briley.

RAISING OF FEDERAL QUESTIONS

The defendant raised the issue of the constitutionality of the Virginia statutory scheme for capital punishment by a motion to quash the capital murder indictment on February 19, 1980, prior to the trial. [See Trial Transcript (hereinafter cited as tr. t.) p. 8, l. 5 through p. 15, l. 3; Joint Appendix on Appeal pps. 84-91 (hereinafter cited as Jt. app.)] This motion was overruled by the trial court and defense counsel objected to the ruling. (Tr. t. p. 19, l. 24 through p. 20, l. 3; Jt. app. p. 95-96) During the trial, defense counsel renewed the motion. (Tr. t. 748 of Jt. app. p. 434) Subsequent to the jury's verdict, defense counsel moved the court to set aside the jury verdict on constitutional grounds (Tr. t. p. 860, l. 22 through 861, l. 7; Jt. app. 465-466) The motion was renewed at the sentencing hearing on p. 4 through 5, l. 13; Jt. app. 468-469. Defense counsel again moved the court to set aside the death sentence on p. 10, l. 23; Jt. app. 471. The trial court overruled the motion on p. 11, l. 3; Jt. app., p. 472.

These constitutional issues were raised again on the appeal to the Supreme Court of Virginia as Assignment of Error number one (1) which read:

1. The trial court erred in failing to sustain the defendant's motion dismiss so much of Indictment No. F80-229 as charged the defendant with capital murder. The defendant's Motion was based upon the grounds that the applicable Virginia Statutes violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, and Article One, Section 11 of the Constitution of Virginia.

The issue was briefed on Appeal to the Supreme Court (See Brief of Appellant, pps. 7, 34 through 38) and was specifically rejected by the Virginia Supreme Court in its opinion (which is attached to this Petition.)

The issue of the constitutionality of the trial court's failure to give a lesser included offense instruction was raised by the defendant by a motion to dismiss the capital murder indictment on the grounds that the evidence would support a first degree murder charge but not a capital murder charge. (Tr. t. p. 671, l. 22) and the defendant objected to this ruling (Tr. t. p. 674, l. 6).

The trial court refused the defendant's proffered instruction on first degree murder (Instruction A, Jt. app. p. 21). The defendant objected to this ruling (Tr. t. p. 736, l. 13 through 20; p. 740, l. 14 through 16; Jt. app. 424, 428). The defendant further objected to the Court's granting of instructions number 6 and 10-A and the Form of Verdict given to the jury. (Tr. t. p. 744, l. 17 through 747, l. 3; Jt. app. 430-433).

The issue was raised on appeal to the Supreme Court of Virginia in Assignments of Error numbered 8, 9 and 12, 14, 15 and 22.

These issues were briefed on appeal to the Virginia Supreme Court and specifically denied by the Court in its opinion. (See opinion attached to this Petition.)

Both of the Questions Presented for Review in this Court were again raised by the defendant in his Petition for Rehearing which is also included in the appendix.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE SUPREME COURT OF VIRGINIA UPHOLDING THE CONSTITUTIONALITY OF THE CAPITAL MURDER STATUTES IS CONTRARY TO THE DUE PROCESS REQUIREMENTS CONTAINED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THEY FAIL TO PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING BETWEEN THE FEW CASES IN WHICH CAPITAL PUNISHMENT IS IMPOSED AND THE MANY CASES IN WHICH IT IS NOT.

The Virginia Supreme Court has continually upheld the constitutionality of the capital punishment statutes.[1]

Decisions of the United States Supreme Court[2] culminating in Godfrey v. Georgia, US 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980) clearly require that the death penalty statutes be given a narrow construction in order to provide a meaningful basis for distinguishing between the few cases in which the death penalty is imposed and the many cases in which it is not. Furman v. Georgia, 408 US 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972). This Court has long recognized that the unchanneled discretion of the sentencer will result in arbitrary and capricious imposition of the death

---

[1] Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979); Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979); Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979); Clark v. Commonwealth, 219 Va. 237, 257 S.E.2d 784 (1978); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

[2] Furman v. Georgia, 408 US 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1976); Gregg v. Georgia, 428 US 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976); Jurek v. Texas, 428 US 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976); Profitt v. Flordia, 428 US 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976).

penalty. Strict standards must be established "to insure that the death penalty is indeed imposed on the basis of reason, rather than caprice or emotion..." Beck v. Alabama, US , 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980) Beck reemphasized that "there is a difference between the death penalty and lesser punishment which is of constitutional magnitude." Id.

Under the Virginia statutory scheme contained in Code §18.2-31 and §18.2-32, how do you determine whether a homicide in the commission of robbery is murder in the first degree or capital murder? There are no statutory guidelines whereby it can be determined, whether a murder which occurs during the commission of a robbery is capital murder or first degree murder. Two people can commit the same crime and one be tried for capital murder and be executed and the other be tried for first degree murder for which execution is not possible. This framework results in the arbitrary and capricious imposition of the death penalty which was specifically rejected in Furman, supra. These same statutes may be applied to result in even more arbitrary distinctions whereby the defendant's fate turns not on his own intent but on the property held by his victim at the time of the crime. An xcellent illustration of this point is contained in the recent Virginia case of Ball v. Commonwealth, 221 Va. , 273 S.E.2d 790 (1981) wherein the Supreme Court of Virginia reversed the conviction of the defendant for capital murder because the killing had occurred in an unsuccessful robbery attempt.

In this case, Curtis Ball, dressed in women's clothes, entered the Rex Shopping Center, a store in Washington County near Abingdon, Virginia. He carried a hand bag containing a loaded pistol. Ball admitted that he entered the store for the purpose of committing a robbery. He asked for the manager and was directed to the clothing department where he found Roger Roark, the assistant manager of the store. Ball demanded money

and when told by Roark that he had no money, a struggle ensued during which Roark was shot and killed. The case went to the jury on a charge of capital murder. Lesser included offense instructions were refused by the court. The jury convicted Ball of capital murder and sentenced him to life in prison. The trial court entered judgment on the verdict. The Supreme Court of Virginia reversed the conviction based on the fact that the robbery attempt had been unsuccessful and therefore the crime was first degree murder, rather than capital murder. What the Virginia Supreme Court has, in effect, said is that if the victim had had money which Ball could have taken from him, then Ball would be subject to the loss of his life for his crime. However, since the victim had no money, Ball could only be guilty of first degree murder. It is certainly an artificial and arbitrary distinction which permits one man to be subject to capital punishment merely on the chance that his victim does or does not have money or property which may be turned over to the defendant. Here the intent of the criminal is the same, but it is the possession of property or the lack of it by the victim which determines the criminal's fate.

The Virginia statutory scheme for capital punishment makes a further unwarranted, arbitrary and capricious distinction in that it permits only the "trigger man" to be convicted of capital murder except in the case of a killing for hire under Code §18.2-31(d). This distinction is contained in Code §18.2-18 which states how principals in the second degree and accessories before the fact are punished. This provision resulted in the reversal of conviction of Major Henry Johnson, Jr. who had been convicted of capital murder.[3] Johnson and his brother went to the office of the victim who was president of the real estate company which rented an apartment to the defendant. The brothers went to Gardner's office to pay overdue rent, but had the joint purpose of robbing Gardner.

During the commission of the robbery, Gardner was killed. There were no witnesses other than the brothers and there was

---

[3] Johnson v. Commonwealth, 221 Va. , 273 S.E.2d 784 (1981)

conflicting evidence as to who fired the fatal shots, both brothers accusing the other. The Virginia Supreme Court reversed Johnson's conviction of capital murder and the resulting death penalty since there was no finding by the jury that the defendant had actually pulled the trigger himself. This arbitrary distinction could result in a situation whereby two defendants may be involved in a robbery; the first defendant could torture and abuse the victim while the second defendant merely looked on and the second defendant could kill the victim with one shot. Under the Virginia statutory scheme, only the defendant who fired the gun could be convicted of capital murder and be subject to the death penalty while the defendant whose conduct was at least as reprehensible would not be subject to capital punishment. A criminal whose conduct was "outrageous or wantonly vile" as required under Code §19.2-264.4, if he did not actually pull the trigger which killed the victim could not be subject to capital punishment, while the defendant who committed a battery which was only the minimum necessary to accomplish an act of murder would be subject to the death penalty.

We live in a land which we think of as being unique. At the core of this uniqueness is a judicial system which places reason above emotion, fairness ahead of capriciousness and due process of law above all else. These principles form the bedrock of our society. The great temptation, especially in hard cases, is to apply reasoning based upon the concept that an accused "got what he deserved". If our country is in fact unique in following the principle of due process of law, the standard is the same whether the case is an easy case or a hard case. There is no room for arbitrary or capricious actions. To think otherwise is to deceive ourselves and tarnish our system of justice. Applying these principles to the instant caes, it is an inescapable conclusion that the Commonwealth of Virginia's statutory framework which determines who can be put to death for homicide and who cannot is arbitary, capricious and illogical.

Why should a defendant who killed during a robbery be subject to execution when a person who commits a homicide while burglarizing and invading the sanctity of a person's home can only be convicted of murder in the first degree? Why should the homicide in the commission or rape constitute capital murder when a homicide in the commission of sodomy or some like offense is not even punishable as murder in the first degree unless it is a willful, deliberate and premeditated killing? Why should the execution of a person turn on whether or not he was successful in committing rape, robbery or abduction? Under Virginia law a person who kills in an unsuccessful effort to commit rape, robbery or abduction cannot be convicted of capital murder, but the successful perpetrator of these crimes can be convicted of capital murder. Where are the standards? Where are the reasons, and where are the justifications for executing one and not the other? There are none.

2. THE DECISION OF THE SUPREME COURT OF VIRGINIA UPHOLDING THE TRIAL COURT'S FAILURE TO GIVE LESSER INCLUDED OFFENSE INSTRUCTIONS IS A VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court's failure to grant lesser included offense instructions, in particular, a first degree murder instruction violated the defendant's right to due process of law in two ways:

A. Under the Virginia statutory framework, a limited number of homicides are punishable as capital offenses. A homicide in the commission of robbery is one such offense. Many homicides, grievous in nature, are punishable as murder in the first degree and not capital murder. Therefore, whether the murder of Gallaher is punishable as capital murder turns not upon the atrociousness of the crime, but whether or not it occurred during the commission of a robbery. Under the evidence in the Briley case, the jury

could have found that Briley killed Gallaher but that the killing did not occur during the commission of a robbery and would therefore be first degree rather than capital murder.

In Virginia, a defendant is entitled to a lesser included offense instruction where there is any credible evidence to support such a theory. McClung v. Commonwealth, 215 Va. 654, 212 S.E.2d 290 (1975), Painter v. Commonwealth, 210 Va. 360, 171 S.E.2d 166 (1969). In addition, the Virginia Supreme Court has said that:

> "The jury is not required to accept, in toto, either the theory of the Commonwealth or that of an accused. They have the right to reject that part of the evidence believed by them to be untrue and to accept that found by them to be true. In so doing, they have broad discretion in applying the law to the facts and in fixing the degree of guilt, if any, of a person charged with a crime." Belton v. Commonwealth, 200 Va. 5, 9, 104 S.E.2d 1, 4 (1958)

In the Briley case, the trial court refused to grant a lesser included offense instruction on first degree murder ruling that, as a matter of law the homicide occurred during the commission of a robbery. In its opinion the Supreme Court of Virginia stated that the trial court ruling was that, as a matter of law, the robbery of Gallaher continued until his death on Mayo Island. Briley v. Commonwealth, 221 Va. , 273 S.E.2d 48 (1980). The opinion of the Virginia Supreme Court then assumed the role of the fact finder and weighed the credibility of the evidence rather than evaluating the existence of any credible evidence to support a lesser included offense instruction. The Court used a felony/murder rationale as stated in Haskell v. Commonwealth, 218 Va. 1033, 243, S.E.2d 477 (1978). Haskell held that where a question exists as to the termination of an underlying felony in advance of a homicide, the determination of this issue should be for the trier of fact. In the Briley opinion the Virginia Supreme Court expanded this ruling to state that the issue of termination of the underlying felony could be decided as a matter of law. Both the trial court and the Supreme Court for Virginia applied "felony/murder doctrine" to a capital murder issue.

We submit that such a liberal "catch-all" interpretation is not permissible in a capital murder case. Godfrey v. Georgia, supra. and cases cited on page 7, at footnote 2.

Under the facts in this case, as indicated in the Statement of Facts, the defendant and his accomplices robbed Gallaher of his watch, money, ring and car at the Log Cabin Restaurant. This robbery, i.e. the taking of Gallaher's property from his person or presence against his will by force or intimidation [Mason v. Commonwealth, 202 Va. 253, 105 S.E.2d 149 (1958)] was then complete. Briley, his brothers and Meekins then abducted Gallaher in his own car, drove around for awhile, arriving at Mayo Island some twenty to thirty minutes after the robbery had occurred. Gallaher was then murdered.

The jury might reasonably have concluded that although Gallaher was robbed and murdered, he was not murdered in the commission of a robbery. By its failure to submit the case to the jury under the lesser included offense instruction of first degree murder, the trial court assured Briley's conviction of capital murder. This was a constitutionally intolerable "enhancement" of the risk of an unwarranted conviction which was struck down by this Court in Beck v. Alabama, US , 65 L. Ed. 2d 293, 100 S. Ct. 2382 (1980).

B. Under the argument advanced in Reason for Granting the Writ Number 1, murder occurring during the commission of a robbery could be capital murder under §18.1-31(d) or first degree murder under Code §18.2-32. Simply stated, the facts which would establish murder during the commission of a robbery in §18.2-31(d), would also establish the lesser included offense of first degree murder contained in §18.2-32. Under the Virginia statutes first degree murder is a lesser offense which is necessarily included in any capital murder case involving a murder which occurs during the commission of a robbery. By refusing to give a first degree murder instruction, the trial court insured the defendant's conviction of capital murder.

Are the rights of an accused any more damaged; any more threatened; or any more disregarded by a statutory rule of law which constituted denial of due process of law than by a judicial decision which denied the accused the same relief? In Beck, supra., this Court held that it was a denial of due process of law for a statute to prohibit the giving of a lesser included offense instruction in a capital murder case. Is a defendant entitled to any less protection from judicial rulings which wrongfully refuse the giving of a lesser included offense instruction in a capital murder case? What rationale supports the premise that it is a denial of due process for a legislative body to prohibit the giving of a lesser included offense instruction in a capital murder case, but it is not a denial of due process of law for a trial judge to refuse the giving of such instruction in a capital murder case? The answer is that there is no reasonable basis upon which such a distinction can be drawn. The sole question is whether or not there is evidence to support such instruction. Beck established the standard upon which to make this determination.

As this Court has said in Beck, "where the evidence establishes that the defendant is obviously guilty of a serious and violent offense, but there is some doubt as to the degree of the offense, failure to give a lesser included offense instruction may enhance the risk of an unwarranted conviction." This Court has termed such a risk "intolerable" where the defendant's life is at stake. Beck, supra., 65 L. Ed. 2d at 403. An "intolerable enhancement" of the risk of an unwarranted conviction occurred in the Briley case as a direct result of the trial court's refusal to give a lesser included offense instruction. See also Keeble v. United States, 412 US 205, 36 L. Ed. 2d 844, 93 S. Ct. 1993 (1973).

This Court has not yet given an answer to the recurring problem of whether the failure to give a lesser included offense instruction in capital cases where the giving of such instruction

RECEIVED
MAR 19 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

LINWOOD EARL BRILEY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

APPENDIX

A. OPINION OF SUPREME COURT OF VIRGINIA

B. ORDER AFFIRMING JUDGMENT OF TRIAL COURT

C. ORDER DENYING REHEARING

D. ORDER GRANTING STAY OF EXECUTION OF JUDGMENT

E. PORTIONS OF RECORD FROM TRIAL COURT INCLUDED IN JOINT APPENDIX ON APPEAL TO SUPREME COURT OF VIRGINIA WHEREIN FEDERAL QUESTIONS WERE RAISED

F. PETITION FOR REHEARING IN THE SUPREME COURT OF VIRGINIA

G. BRIEF OF APPELLANT FILED IN THE SUPREME COURT OF VIRGINIA

in Clerk's Office

Present: All the Justices

LINWOOD EARL BRILEY

v. Record No. 800690

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HARRY L. CARRICO
November 26, 1980

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I
William E. Spain, Judge

In a two-stage jury trial conducted in accordance with Code §§ 19.2-264.3 and -264.4, the defendant, Linwood Earl Briley, was convicted of capital murder for a willful, deliberate, and premeditated killing occurring in the commission of robbery while armed with a deadly weapon, Code § 18.2-31(d), and his punishment was fixed at death.[1] After receipt of a post-sentence report of a probation officer, Code § 19.2-264.5, the trial court imposed upon the defendant the sentence fixed by the jury. Pursuant to Code § 17-110.1(A) and -110.1(F), the defendant is here for automatic review of his death sentence, consolidated with his appeal from his conviction.

The victim in the case, John Harvey Gallaher, was a disc jockey for a Richmond radio station and a member of a small "musical combo." On the evening of September 14, 1979, Gallaher was playing with the "combo" at the Log Cabin, a southside Richmond restaurant. During an intermission, Gallaher left the restaurant by a rear door. He never returned. Two days later, his bullet-torn body was found, half-submerged, at the foot of a bank on Mayo Island in the James River.

On October 22, 1979, Duncan Meekins was arrested and charged in connection with the robbery and murder of Gallaher. Subsequently, Meekins implicated the defendant in the offenses.

[1]The defendant was convicted also of using a firearm in the commission of murder. This conviction, however, is not involved in, or pertinent to, this appeal.

Meekins was the Commonwealth's principal witness at the defendant's trial. In his testimony, Meekins stated that, on the evening in question, he was with the defendant and the latter's two brothers, Anthony and James, when the foursome decided to look for "somebody to mug." The group had a sawed-off shotgun and a high-caliber rifle in their car as they drove up and down Jefferson-Davis Highway in southside Richmond looking for a likely victim. Unsuccessful in their quest, they parked near the Log Cabin "to see if [a possible victim] was going to come out." Exiting their car, they hid behind some bushes at the rear of the Log Cabin, with the defendant carrying the rifle and Meekins the shotgun.

According to Meekins' further testimony, Gallaher came out the rear door of the Log Cabin and walked over to the bushes where the waiting gunmen were hiding. The defendant accosted Gallaher, ordered him to lie face-down on the ground, and removed his wallet and keys. At the defendant's direction, Meekins went to look for Gallaher's automobile. When Meekins returned with the car, a Lincoln Continental, he and the defendant forced Gallaher to lie on the rear floorboard. With Meekins in the back seat guarding Gallaher, the defendant drove the car away. Anthony and James drove off in the automobile in which they had arrived at the Log Cabin; sometime later, Anthony and James parked their car and joined the defendant and Meekins in Gallaher's automobile.

Continuing with his testimony, Meekins stated that the defendant drove to Mayo Island in the James River and parked on the grounds of a paper company located there. The defendant and Meekins forced Gallaher from the car. When Gallaher "started struggling like to stand up," the defendant "came up with the rifle and shot him."

Concluding his testimony, Meekins said that 15 to 20

minutes elapsed from the time Gallaher was seized at the Log Cabin until he was shot on Mayo Island. After the shooting, the assailants left the murder scene and drove around the city in Gallaher's car. When the "tank ... almost ... was on empty," the culprits parked the car and stripped it of parts.

Testifying in his own behalf as his only witness, the defendant denied all complicity in the robbery and murder of Gallaher. The defendant stated that, on the evening in question, he gave Meekins a ride to the home of Meekins' uncle in southside Richmond. After Meekins left the vehicle, the defendant proceeded toward a fried chicken restaurant to see a girl who worked there; en route, his car broke down, and he tried unsuccessfully to restart it. Sometime later, Meekins drove up in a Lincoln automobile and gave the defendant a ride home. The defendant admitted that he and Meekins stripped the Lincoln of parts.

Other testimony below showed that the defendant's fingerprints were found in Gallaher's car. When arrested, the defendant was wearing Gallaher's ring; Gallaher's watch was found in the defendant's home. The defendant told the arresting officer that he bought the ring and watch from a person known as "A.C." In his testimony, however, the defendant stated he purchased the items from Meekins.

In a pretrial motion, the defendant sought dismissal of his capital murder indictment on the ground that Virginia's death penalty statutes are unconstitutional. The trial court denied the motion. On appeal, the defendant states that he is familiar with the constitutional arguments advanced against the death penalty statutes in earlier cases before this court,[2] and he recognizes

[2]The defendant cites: Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, ___ U.S. ___, 100 S.Ct. 1666 (1980); Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103 (1980); Clark v. Commonwealth, 220 Va. 201,

that the rulings in those cases are adverse to his position. The defendant says, therefore, that, while he wishes to preserve the points, he need not repeat the arguments. Further, the defendant raises purportedly novel arguments against the validity of the death penalty statutes. These arguments, however, are mere variations of the themes previously argued and ruled meritless. We need not repeat the rulings; we reaffirm them and, accordingly, reject all the defendant's arguments concerning the validity of the death penalty statutes.

In another pretrial motion, the defendant sought a change of venue based upon a claim of prejudicial publicity. The trial court denied the motion. On the morning of trial, the defendant renewed the motion; the court again denied the request.

In support of his change-of-venue motion, the defendant submitted affidavits from members of the community, scripts of broadcasts by local television stations, and a notebook containing approximately 70 articles from local newspapers. These materials showed that, in the months preceding the defendant's trial for the present offenses, he and his brothers had been tried in the Richmond area on numerous charges of rape, robbery, and murder, all of which had been given extensive media coverage. In the opinion of the affiants in the several affidavits, the defendant could not "receive a fair trial by an unbiased and impartial jury in the City of Richmond."

Although acknowledging that the question whether to change venue generally is left to the sound discretion of the trial court, the defendant contends that the "unusual circumstances

257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980); Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, cert. denied, 442 U.S. 924 (1979); and Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979).

of this case and the resulting extensive media coverage" concerning his present and earlier crimes required the granting of his motion to change venue. Citing a number of our prior decisions involving change-of-venue questions,[3] the defendant argues that, in resolving the issue in this case, we should consider (1) the time elapsed between the commission of the crimes charged and trial, (2) the community interest in the case, and (3) the difficulty encountered in selecting a fair and impartial jury.

The defendant says that the publicity concerning his current and earlier crimes continued "right up to the time" of trial of the present charges. He states further that community interest in the case was aroused by the publicity to the extent that his name became "almost synonymous with 'brutal killings.'" Finally, he asserts that the selection of a jury in his case proved difficult, the process consuming over ten hours and requiring examination of 55 prospective jurors.

There are fatal weaknesses, however, in the defendant's position. He does not claim that any of the publicity about which he complains was either inaccurate or intemperate. Greenfield v. Commonwealth, 214 Va. 710, 717, 204 S.E.2d 414, 419 (1974). Neither has he demonstrated "such a widespread feeling of prejudice on the part of the citizenry as [would have been] reasonably certain to prevent a fair and impartial trial." Coppola v. Commonwealth, supra note 2, 220 Va. at 248, 257 S.E.2d at 801. Nor has he directed us to specific portions of the record "which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected." Dobbert v. Florida, 432 U.S. 282, 303 (1977).

---

[3]The defendant cites: Newcomer v. Commonwealth, 220 Va. 64, 255 S.E.2d 485 (1979); Poindexter v. Commonwealth, 218 Va. 314, 237 S.E.2d 139 (1977); Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977); Foster v. Commonwealth, 209 Va. 297, 163 S.E.2d 565 (1968); and Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962), cert. denied, 372 U.S. 964 (1963).

In this latter connection, the defendant cites the voir dire examination of two prospective jurors, Barbara Smith and William Slaughter. The defendant argues that these prospective jurors should have been excluded for cause since widespread media coverage had influenced them to the extent that they had formed opinions concerning his guilt and, therefore, they could not stand indifferent in the case.

The record shows clearly, however, that while these two prospective jurors had read accounts or listened to broadcasts concerning the criminal activities of the defendant, neither venireman had formed an opinion concerning the defendant's guilt. Furthermore, both prospective jurors stated unequivocally that they would determine the case solely upon the evidence presented in court. Their exposure to media coverage, therefore, did not disqualify them from service on the defendant's jury.[4] Irvin v. Dowd, 366 U.S. 717, 723 (1961).

The defendant's complaint concerning pretrial publicity is no more than a claim that the sheer volume of the media coverage of his and his brothers' many crimes required a change in the location of his trial. Such a claim, standing alone, does not suffice to require a change of venue. Dobbert v. Florida, supra, 432 U.S. at 303; Smith v. Commonwealth, supra note 2, 219 Va. at 462, 248 S.E.2d at 140.

The defendant's next contention involves an incident occurring during the guilt stage of his trial. When chief prosecution witness Duncan Meekins was under cross-examination, defense counsel began to question him concerning a plea agreement he had made with the Commonwealth. Meekins stated that, in return for his truthful testimony, the Commonwealth had promised he would

[4] Barbara Smith actually served on the defendant's jury. William Slaughter was excluded by the exercise of a peremptory challenge by the defense.

"get no more time than anybody else in this case." Asked whether this was "the extent of the agreement," Meekins replied, "[f]or this case, yeah." At this point, the prosecutor asked the court to confer with counsel out of the hearing of the jury.

In the conference, it was revealed that the plea agreement encompassed not only the present case but also a number of other cases in which Meekins was charged along with the defendant and his brothers. In one of these prosecutions, Meekins himself was subject to the death penalty. The plea agreement provided that, in return for Meekins' testimony against the Brileys in each case involving them, the Commonwealth would not seek the death penalty against Meekins and he would not receive any sentence greater than was imposed upon his accomplices in the various cases.

Defense counsel proposed to inquire fully into the plea agreement and the other crimes with which Meekins was charged. Defense counsel desired to show the "pressure brought to bear" upon Meekins and to demonstrate that he was testifying against the defendant in return for the Commonwealth's promise that "he [would] not get the chair."

The trial court ruled that, if defense counsel examined Meekins concerning the other crimes, the Commonwealth would be permitted to question the witness with respect to the defendant's participation in the same offenses. Defense counsel elected not to pursue the matter further.

The defendant argues that "there was no basis upon which the trial court [could] have made [its] ruling"; the defendant's involvement in the other crimes was irrelevant to Meekins' motivation for testifying on behalf of the Commonwealth. In imposing a condition upon further cross-examination, the defendant maintains, the trial court denied his constitutional right to

confront his accusers and limited his ability to demonstrate a basis for bias or prejudice on Meekins' part.

The defendant relies upon our decisions in Woody v. Commonwealth, 214 Va. 296, 199 S.E.2d 529 (1973), and Deavers v. Commonwealth, 220 Va. 14, 255 S.E.2d 458 (1979), as support for his argument. Both cases, however, are inapposite. In Woody, we reversed the trial court's refusal to permit the accused to cross-examine accomplices concerning their participation in other crimes, not involving the accused. We said the cross-examination was proper to show the witnesses were testifying falsely in the hope of obtaining leniency in the other cases. In Deavers, we held that the trial court had erred in denying the accused permission to cross-examine an accomplice concerning whether the latter had been offered leniency in exchange for his testimony.

In both Woody and Deavers, the denial of the right of cross-examination was absolute with respect to the particular point involved. Here, there was no denial of any right. The defendant had shown the jury that Meekins was testifying pursuant to a plea agreement and had brought out what the agreement provided concerning the present case. The trial court merely warned defense counsel of the consequences that would flow from inquiry into the other crimes with which Meekins was charged.

We do not believe the trial court erred in its ruling. The situation here is identical with that addressed in United States v. Barrentine, 591 F.2d 1069 (5th Cir.), cert. denied, 444 U.S. 990 (1979). There, in a gambling prosecution, the government's star witness, an accomplice of the appellants, was cross-examined concerning his prior arrests on other charges. On redirect examination, the prosecution was permitted to show by the witness that one of his prior arrests involved an incident where he had picked up marijuana at the request of one of the appellants.

As in the present case, the trial judge in Barrentine had warned defense counsel that questioning the witness concerning other crimes would open the door to redirect testimony of the appellants' involvement in those crimes. The Fifth Circuit affirmed, stating:

> Cross-examination on a part of a transaction enables the opposing party to elicit evidence on redirect examination of the whole transaction at least to the extent that it relates to the same subject.

591 F.2d at 1081. We adopt the quoted language as applicable here and dispositive of the question under discussion.

This brings us to the defendant's major contention. Here, the defendant argues that the trial court erred in refusing a defense instruction which would have permitted the jury to find that the robbery of Gallaher terminated at the Log Cabin restaurant and, therefore, that the defendant was guilty only of the non-capital offense of first degree murder in the subsequent killing of Gallaher. As a corollary, the defendant argues that the court erred further in refusing to permit defense counsel to argue the first-degree-murder theory before the jury.

At this point, it is important to clarify what the trial court ruled and what it did not rule. Contrary to the indication in the defendant's brief, the court did not rule as a matter of law that the killing of Gallaher occurred in the commission of robbery. Out of the hearing of the jury, the court did rule that, if the jury believed the defendant robbed Gallaher at the Log Cabin, then, as a matter of law, the robbery continued until Gallaher's subsequent death on Mayo Island. The record does not reveal, however, that this ruling was ever communicated to the jury. Further, contrary to what the defendant suggests, the lower court did not prohibit counsel from arguing to the jury that the killing did not occur in the commission of robbery.

The record shows the trial court granted Instruction 6, which told the jury that the burden was upon the Commonwealth to prove, inter alia, the killing of Gallaher occurred during the commission of robbery and that, in the failure of this burden of proof, the jury should find the defendant not guilty of capital murder. The court also granted Instruction 10A, which defined the offense of robbery. And, in the discussion between court and counsel concerning instructions, the trial judge made clear defense counsel could argue to the jury that the Commonwealth had failed to prove "the elements of the crime" of capital murder, including the element "that the killing occurred during the commission of robbery." The court only prohibited defense counsel from arguing that the robbery, if it occurred, terminated with the conclusion of the events at the Log Cabin restaurant.

With this clarification, it is obvious that the trial court took the position that the jury should be permitted only two options, viz., to find the defendant guilty of capital murder or to acquit him. Relying upon Beck v. Alabama, ___ U.S. ___, 100 S.Ct. 2382 (1980), the defendant argues that the jury should have been given a third alternative, viz., to convict him of the lesser included offense of first degree murder on the theory that the robbery of Gallaher had terminated well in advance of the murder.

In Beck, a capital case involving robbery and murder of the victim by the accused and an accomplice, the trial court refused the defense a first-degree-murder instruction. Noting that the accused had admitted participation in the robbery but had denied killing the victim or intending his death, the Supreme Court reversed, stating that the defense was entitled to the instruction.

Beck, however, is inapposite. Unlike the accused there,

this defendant denies all complicity in both the robbery and the killing of the victim. Furthermore, in Beck, an Alabama statute forbade the granting of lesser-included-offense instructions in capital cases. Virginia has no similar statute or other rule of law requiring the same result. In this state, such instructions are proper, but only when supported by evidence. Clark v. Commonwealth, supra note 2, 220 Va. at 209, 257 S.E.2d at 789; Painter v. Commonwealth, 210 Va. 360, 367, 171 S.E.2d 166, 171 (1969). Beck did not affect this rule. Indeed, the holding in Beck was responsive to this question:

> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?" (Emphasis added.)

___ U.S. at ___, 100 S.Ct. at 2384. The question becomes, therefore, whether there was any basis in the present case for permitting the jury to consider a verdict of guilt of a lesser-included non-capital offense.

In this connection, both the defendant and the Attorney General cite our decision in Haskell, et al. v. Commonwealth, 218 Va. 1033, 243 S.E.2d 477 (1978). There, the three appellants and a fourth assailant named Gaynor attacked a sailor pursuant to a predesigned plan to rob him. When the robbers found no money on the victim, they tried to get into their car and drive away. The victim attempted to prevent their escape, and Gaynor shot and killed him. Convicted of attempted robbery and murder, the appellants contended on appeal that the evidence did not sustain their convictions under the felony-murder doctrine because the attempted robbery had been abandoned before the victim was shot. Rejecting this contention after an examination of numerous authorities, we said that, under the prevailing rule:

> [T]he felony-murder statute applies where the initial felony and the homicide were parts of one continuous transaction, and were closely related in point of time, place, and causal connection, as where the killing was done in flight from the scene of the crime to prevent detection or promote escape.

218 Va. at 1041, 243 S.E.2d at 482.

We stated further:

> The rule which we adopt, therefore, consistent with the weight of authority elsewhere, is that the felony-murder statute applies where the killing is so closely related to the felony in time, place, and causal connection as to make it a part of the same criminal enterprise.

218 Va. at 1043-44, 243 S.E.2d at 483.

The defendant here relies upon the portion of the Haskell opinion wherein we observed that "[i]t was for the fact finder to determine ... whether the attempted robbery had been terminated within the purview of the [felony-murder] statute." 218 Va. at 1043, 243 S.E.2d at 483. But, in Haskell, the finding concerning the termination of the attempted robbery actually had been made by the trier-of-fact; we were not called upon to decide whether the determination properly might have been made as a matter of law. As the Attorney General points out, Haskell does not require that the trier-of-fact always determine whether an initial felony has terminated in advance of a homicide. Indeed, the Haskell opinion indicates clearly that, in an appropriate case, the issue properly may be decided as a matter of law. 218 Va. at 1044, 243 S.E.2d at 484.

The defendant maintains, however, that, in refusing to permit the jury in this case to determine whether the robbery of Gallaher terminated before the killing, the trial court improperly applied a liberal interpretation of the felony-murder doctrine. A capital murder case differs from the typical felony-murder situation, the defendant asserts, and the decisions of the United States Supreme Court require a more restrictive interpretation of

applicable principles in death penalty cases.[5]

Even giving applicable principles strict interpretation, we believe the trial court did not err in refusing a first-degree-murder instruction and in ruling that, if a robbery occurred in this case, it did not terminate with the conclusion of the events at the Log Cabin restaurant. Uncontradicted evidence supported the trial court's holding concerning the continuation of the robbery; no evidence supported granting the instruction.

The distinctive elements of robbery are (1) the use of violence, or the threat thereof, against the victim, and (2) the theft of property from his person or in his presence. Theft of property is a trespass upon the rights of the owner therein for as long as he is deprived of the use thereof; he retains legal possession of the goods stolen even when they are in the actual possession of the thief. Dunlavey v. Commonwealth, 184 Va. 521, 525-26, 35 S.E.2d 763, 765 (1945). In a robbery prosecution, where the violence against the victim and the trespass to his property combine in a continuing, unbroken sequence of events, the robbery itself continues as well for the same period of time.

Here, obviously, the jury believed a robbery occurred. It is equally obvious that Gallaher's automobile was a fruit of the robbery. Uncontradicted testimony submitted by the Commonwealth showed conclusively that the violence against Gallaher and the trespass to his automobile combined and continued unabated from the time of the initial taking of the car at the Log Cabin until Gallaher was killed on Mayo Island only 15 to 20 minutes later. Thus, borrowing and adapting the language of Haskell, we hold that the killing involved here was so closely related in time,

[5] The defendant cites: Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759 (1980); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 238 (1972).

place, and causal connection as to make the killing, as a matter of law, a part of the same criminal enterprise. Cf. Doane v. Commonwealth, 218 Va. 500, 237 S.E.2d 797 (1977) (where no causal relationship or nexus shown between antecedent felony and killing, accused not guilty of felony-murder).

One defense argument remains in this phase of the case. The defendant maintains that he cannot be convicted of capital murder for a robbery involving the theft of Gallaher's car because there was no evidence that the defendant or his accomplices "intended to take [the car] permanently." We reject this argument out of hand. We can conceive of no more conclusive evidence of the intent to deprive an owner of his car permanently than the testimony presented in this case that the car was stolen contemporaneously with the murder of its owner and later abandoned and stripped of parts.

The defendant's next contention concerns the trial court's refusal, in the penalty stage of the trial, to grant defense Instruction A2. This instruction would have told the jury:

> The Court instructs the jury that even though you may believe that the Commonwealth has proven, beyond a reasonable doubt, the elements necessary for you to recommend that Linwood E. Briley be put to death, you are not required by law to recommend the death penalty and you may fix Linwood Earl Briley's punishment at imprisonment for life.

The defendant argues this instruction was necessary to inform the jury clearly that it was not bound to recommend the death sentence in any event. In Instruction 1A, however, the trial court told the jury:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

> (1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society;
>
> or
>
> (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment. (Emphasis added.)

In our opinion, this last-quoted instruction clearly and sufficiently informed the jury of its option to fix the defendant's punishment at life imprisonment, even though it also found the existence of the aggravating circumstances permitting a recommendation of the death penalty. Defense Instruction A2, therefore, was unnecessary. Smith v. Commonwealth, supra note 2, 219 Va. at 479-80, 248 S.E.2d at 149-50.

In his final assignment of error, the defendant contends that his sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor and that the sentence is excessive or disproportionate to the penalty imposed in similar cases. Our examination of this record, however, convinces us that the defendant's sentence was not influenced by passion, prejudice, or other arbitrary factor. With respect to excessiveness or disproportionality, we have examined the records in two other death penalty cases decided today[6] and in cases decided

[6] James Dyral Briley v. Commonwealth, ___ Va. ___, ___ S.E.2d ___ (Record No. 800904); Turner v. Commonwealth, ___ Va. ___, ___ S.E. 2d ___ (Record No. 800375).

previously[7] in which death sentences were upheld. From this examination, we conclude that the defendant's sentence is not excessive or disproportionate.

Finding neither error in the judgment appealed from nor other reason to disturb the death sentence imposed in this case, we will affirm the defendant's conviction and sentence.

Affirmed.

[7]The cases decided previously are listed at the end of the opinion in James Dyral Briley v. Commonwealth, supra note 6.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 26th *day of* November, 1980.

Linwood Earl Briley, Appellant,

against Record No. 800690
Circuit Court No. F-80-229

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Richmond, Division I, on the 10th day of March, 1980.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

It is ordered that the said circuit court allow counsel for the appellant a fee of $550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be forthwith certified to the said circuit court.

A Copy,

Teste:

Allen L. Lucas
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 16th *day of* January, 1981.

Linwood Earl Briley, Appellant,

against Record No. 800690
Circuit Court No. F-80-229

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 26th day of November, 1980, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

JAN 22 1981

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 17th *day of* February, 1981.

Linwood Earl Briley, Appellant,

against Record No. 800690
Circuit Court No. F-80-229

Commonwealth of Virginia, Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgment rendered herein on November 26, 1980, and January 16, 1981, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on November 26, 1980, and January 26, 1981, be, and the same is hereby, stayed, to and including the 16th day of April, 1981, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

Allen L. Lucy
Clerk

this Court was returned February the 14th, all of those matters have been before the Court, been argued, and they just this morning have been made a part of the record. So I will overrule your motion for a continuance.

MR. RICE: If Your Honor please, before Mr. Cowan moves on to the next motion, I would also like the record to reflect that not only was the Court correct in that the language in those indictments in Division I and II are the same, but I would also like to let the record note that the trial dates are also the same, having been set for the 19th.

THE COURT: That is correct.

MR. COWAN: If Your Honor please, for the record, I would like to state our objection to the ruling of the Court and state that even though this man was indicted in Division II, and even though the trial date was set for today, in fact, the trial on those cases is not being pursued. It is a new indictment in a new Division of the Circuit Court in the City of Richmond. And we respectfully submit that the defendant is entitled to additional time to consider the consequences of the change in the site of the trial on the new

indictment or any incidences thereto. That is the basis for it. We would like that to be in the record as our grounds for the objection to the denial of the Court of our motion for a continuance.

Judge, we would respectfully move the Court to dismiss the capital murder indictment as to the defendant on the grounds that under our system in Virginia, Section 18.2-18 of the Code of Virginia provides that only a principal in the first degree can be convicted of capital murder except a principal in the second degree for murder for hire can be convicted of capital murder.

Our position is that under the facts that the Commonwealth will seek to prove in this case, that this alleged homicide took place with several parties participating, as the Commonwealth's evidence will show. And we respectfully submit that a statute or a statutory setup which says that only the person actually ultimately pulling the trigger or doing whatever act is necessary to consummate the homicide can be guilty of capital murder is, in fact, a denial of equal protection under the law to that person.

As I understand our law, I believe this is the only case in our law where a principal in

the second degree is treated differently than a principal in the first degree as to punishment, and we respectfully submit that the capital murder indictment, so much of it as charges capital murder, should be quashed and that the trial should go forward as to this defendant, Linwood Earl Briley, only on the grounds of first degree murder because he is being denied equal protection under the law by virtue of our statutory setup.

MR. RICE: Your Honor, the Commonwealth's position would be it is not a denial of equal protection in that the defendant does not stand in the same relationship as do the other codefendants in this case. That the legislature, the General Assembly, draw a line between those who actually perpetrated the crime and those who were present. He is not in the same degree and classification and he is not denied equal protection under the law, under Virginia law.

THE COURT: Hasn't that case been passed on, the whole statutory scheme of our capital cases?

MR. RICE: Yes, sir, Michael Marnell Smith.

THE COURT: Michael Marnell Smith is the case in Judge Carneal's court.

MR. COWAN: If Your Honor please, that is different. In that case you have one individual who, under the Commonwealth's case, was the sole perpetrator of the crime. In this case, you have several people that the Commonwealth would attempt to show were involved.

So we respectfully submit that neither our Supreme Court nor the Supreme Court of the United States -- our Supreme Court being the Virginia Supreme Court -- neither has passed on the issue we are raising.

MR. RICE: If Your Honor please, just a brief response: I submit to the Court that this actual situation is the same as in Commonwealth versus Stamper and also in Camp (ph.) versus the Commonwealth, in which case there were several participants and only one triggerman.

THE COURT: The statutory scheme, as I understand it, the imposition of the death penalty has been moved to the triggerman, whoever he may be. And I think the legislature in its wisdom can do that.

It may be that you start out as a principal in the second degree, but somewhere along the line you become the man who pulls the trigger, and they

have said that is the point we must focus on.

For that reason, I do not deem it a denial of due process and will not strike the capital murder provision of the indictment.

MR. COWAN: If Your Honor please, we would like for the record to note our objection for the reasons heretofore stated. And I refer the Commonwealth to the equal protection clause of the Fourteenth Amendment. I would also like to say it is in violation of due process.

THE COURT: Yes, sir.

MR. COWAN: Your Honor, we would respectfully move the Court to dismiss that part which would purport to charge capital murder as being unconstitutional on the grounds that under our statutory scheme of homicides in Virginia, the distinction between murder in the first degree and capital murder is arbitrary and capricious in that murder in the first degree can be by poison, lying in wait, imprisonment, starvation, or any other willful and premeditated killing.

And if Your Honor please, we respectfully submit that someone convicted under that section of murder or that framework of murder is not subject to being put to death. We respectfully submit that

is an arbitrary and capricious delineation by a legislature of someone in its denial of equal protection of law and due process. Someone could be convicted under any of that and just be convicted of first degree murder, and to attempt to convict this defendant of capital murder is a denial of equal protection and due process.

May I say one other grounds? We would further say that this same statute, 18.2-31 of the Code of Virginia, gives the Commonwealth apparently the election to prosecute a homicide in the commission of robbery either as first degree or as capital murder. We say further that that is a denial of equal protection and due process of the law.

MR. RICE: If Your Honor please, as to the first part of Mr. Cowan's argument, I submit that the issue of the distinction between first degree under 18.2-32 and 2-31 of the Code had been rightfully stated and is discretionary. And second, that the Commonwealth has any election -- I submit that the Commonwealth is entitled to proceed on as many different theories of the murder as the evidence may or may not bear. And there is some theory that the first degree would be included as a lesser-

included one, and the Commonwealth has a right to proceed on either or all.

THE COURT: Wouldn't the Commonwealth have the right to proceed on capital murder and not on the death penalty?

MR. RICE: Yes, sir.

THE COURT: As I see it, the legislature has laid out six grounds of capital murder in which death may be the penalty. I understand probably that the House passed a seventh, multiple murder, but that isn't a question here. I think they have delineated which of all the choices.

(To Mr. Cowan) I get your point. Any other willful murder could include anything including the six that may carry the death penalty. But on the other hand, to say that it gives the Commonwealth an election as to whether it will try some people on a capital case and some on a first degree case is less sound reasoning in view of the fact that they may indict on the capital case and never ask for the death penalty.

MR. RICE: Just again briefly, going to the discretion of the prosecutors to determine who would be indicted on capital and who for first, I submit that was litigated in Roberts versus Louisiana

in the United States Supreme Court in which the majority said somewhere along the line just maybe, in light of the prosecuting attorney's office, it is discretionary as to how to proceed.

MR. COWAN: Judge, I am in favor of Roberts versus Louisiana. I think that the Supreme Court has, in the past, made some distinction and rules in the past to the effect that the prosecutor does have some discretion as to how he is going to proceed.

Our point, and what I want the record to reflect, is that there is no significant difference as far as the gravity of the offense between the crimes set out in 18.2-31 as the capital murder statute and that part of 18.2-31 of the Code of Virginia which says that first degree murder can be any murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing.

So what I am saying is that the distinction, that is, by our legislature of what is capital murder and what is first degree murder is arbitrary, is capricious, is denial of equal protection of the law. And it is denial of this defendant, Linwood Earl Briley, in that he can be placed on trial for capital

murder when someone that has committed the grievous acts referred to in 18.2-32.3 can only be placed on trial for first degree murder.

We would respectfully ask that the record reflect our position on this point.

THE COURT: It will, but the motion is overruled.

MR. COWAN: If Your Honor please, I have two other Constitutional motions that I would like to make. We respectfully move the Court to dismiss the capital murder indictment or so much thereof as would try this defendant on the charge of capital murder on the grounds that in Section 19.2-264.2 of the Code of Virginia, the jury is permitted to give the death penalty or recommend the death penalty if they find the Commonwealth has proven beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageous or inhumane.

We respectfully submit, if Your Honor please, that those provisions are so vague that the statute is unconstitutional on its face.

If Your Honor please, we are familiar with the two Virginia cases, or one in particular, in which that issue has been submitted. The Smith case was submitted and I believe our Court, the Virginia Supreme Court, refused to sustain the challenge on the constitutionality as to the grounds I just set forth.

And as an officer of the Court, I feel compelled to say we are familiar with the case. We understand that. But for our record here today, we respecfully submit that the Supreme Court of the United States has not passed on those issues as they pertain to the Virginia Statute, and I would like to preserve that point.

MR. RICE: If Your Honor please, my response would be that both May (ph.) and Smith were confirmed by the Supreme Court, and that area was decided.

And I would also point out to the Court that the Virginia framework is in line with Gregg versus Georgia and Jurek versus Texas. I think both were basically constitutional.

THE COURT: They break those cases into about three groups, don't they?

MR. RICE: Yes, sir.

is required to show in order to carry its burden of showing that there is a likelihood. Of course, nothing is certain in this world but perhaps death and taxes.

I think I see a very good reason for it because we know that over a period of many years that many people who were executed never committed a crime before in their lives. They had led exemplary lives, and they weren't allowed to show that to the jury. I notice in the Beatty (ph.) case that -- he was a Chesterfield man. Of course, he was himself a rich man, a man twenty-seven years old, had led a perfectly exemplary life until he blew his wife's head off with a shotgun. And at that point, he wasn't allowed to show his previous good behavior. Conversely, if his record had been very bad, the Commonwealth couldn't show that.

So many people who went through death row and were executed had much going in their favor if they had been allowed to show it. It is something like giving the Judge a presentence report, giving him at least an educated guess about who he is dealing with once he has arrived at the question of guilt.

Motion is overruled. You may state your objection.

MR. COWAN: We respectfully ask that the record reflect our objections for the reasons heretofore stated.

If Your Honor please, we would move for a separate voir dire as to each prospective juror.

THE COURT: Well, I first propose to bring twenty in and go through the general questions, then send them out and let counsel or the Clerk call them back one at a time.

MR. COWAN: That is satisfactory with us.

MR. RICE: That is agreeable with the Commonwealth, sir.

THE COURT: All right.

MR. COWAN: When it comes to the individual voir dire, we have one question that we would like for the Court to ask. May we take that up at this time?

THE COURT: Does that complete your motions?

MR. COWAN: Yes, sir, if Your Honor please.

THE COURT: That is in addition to the number that you have filed before.

MR. COWAN: Yes, sir. I would, for the record, if Your Honor please, like to renew -- I don't think it is necessary -- the change of venue motion that we filed in the Circuit Court of the-

JURY OUT

MR. COWAN: Judge, I understand that the Commonwealth has another witness that they are going to call, and then I believe the Court is going to charge the jury and submit the case for argument. I wanted to make sure the record would be clear that I can renew my motion to strike at this time as opposed to the conclusion of the rebuttal witness's testimony.

THE COURT: Yes.

MR. COWAN: And also renew at this time all of the previous constitutional arguments that I have made, if Your Honor please.

THE COURT: Certainly.

MR. COWAN: And that I do not have to remake them after the rebuttal argument.

THE COURT: Sure.

MR. RICE: After the Commonwealth's witness, then the Court is going to immediately charge the jury. I bring to the Court's attention that neither side has made any requests as far as the length of argument. Did the Court want to take that up at this time or argue the case as the evidence would bear.

THE COURT: I would like to, if possible,

on behalf of the Commonwealth, your services are appreciated, and I would have told you that same thing no matter what your verdict had been.

You are now discharged from further consideration of this case.

Sheriff, will you see that they get back to the hotel and feed them their lunch, those who want lunch. Some may want to leave. But if others want lunch, you may have your lunch, and then discharge them from the hotel after you have checked them out.

(To the defendant and defense counsel) All right. You all may be seated.

THE SHERIFF: (To the jury) Do you all want to come and get your things?

NOTE: Members of the jury who have left personal articles in the jury room return to the jury room briefly and then leave the courtroom. The jury leaves the courtroom at 1:20 o'clock p.m., whereupon the hearing resumes, viz:

JURY OUT

MR. COWAN: If Your Honor please, on behalf of the defendant, I respectfully move the Court to set aside the verdict, the finding of the jury on all the constitutional grounds which I have

JURY OUT

previously raised and also based on all objections and motions that I have previously made, all of which I can't remember, and I think by our previous agreement I don't have to cite them all now.

THE COURT: You do not, that is correct, sir.

Mr. Cowan, I think that you and Mr. Robinson, Mr. Beard, and Ms. O'Toole have done the best you could with what has been a hard case, a very hard case.

As I heard it explained, you get into this type of case and it feels like a tidal wave is coming in on you. And I am sure you all felt that way at times yesterday.

It has been fifteen years since I was at the bar, and I have prosecuted cases and defended cases previously in which the death sentence was returned, and it is no happy event. I am not trying to be facetious when I say that.

But we have lived with this case since 10:00 o'clock Tuesday morning. It is now 1:21 Friday afternoon, and I have not only lived with it all day, I have lived with it all night each day.

Investigation, something about an arrest in Norfolk for robbery and attempted murder in North Carolina. He says that that is incorrect.

Under all of the circumstances of this case and the record, I would think we would respectfully ask the Court to disregard that.

THE COURT: What does the NG stand for?

MR. COWAN: I think "not guilty," Your Honor.

THE COURT: Not guilty, that is all I can make out of it, too. And then a robbery and attempted murder, released to local authorities on the Virginia warrants.

Well, if he disputes that, I am going to X it out. If he was found not guilty on one charge and not prosecuted on the other, I don't think that it should be considered.

MR. COWAN: If Your Honor please, in order that the record may be clear, we would respectfully again ask the Court to set aside the jury's verdict for all of the reasons which were stated, all of our motions, and all of our objections which are, in fact, on the record.

THE COURT: Yes, sir.

MR. COWAN: And we would ask the Court, in

addition, to set aside the jury's verdict and grant the defendant a new trial on all issues, based upon -- under the totality of the case and the circumstances, he was denied due process of law. We would also at the same time reraise for the record all of the constitutional issues that we raised.

Judge, the jury heard the evidence. The Court heard the evidence. I don't possess the wisdom at this time to try to talk the Court into not entering or following the jury's verdict. The Court heard all of the evidence. We ask the Court not to impose the death sentence and we leave it with the Court in that regard.

One other point that I would like, Judge: It is my understanding that the transcript of the actual trial will be a part of the record.

THE COURT: I have a note of that already, to do that, make it a part of the record.

MR. COWAN: And we also would like, as part of the record, the transcript of the venue hearing which was heard on south side and the transcript of the hearing which was heard on February the 13th or the 14th, that was when the issues were raised by the Commonwealth as to whether or not the defendant would waive venue on certain

would be nothing gained by postponing this until tomorrow morning.

MR. COWAN: I agree, Judge.

THE COURT: But I wanted to be sure that counsel was making the conscious choice.

MR. COWAN: I understand, Judge.

THE COURT: In having reviewed this, frankly, I think the jury was right in finding you guilty under both of the statutory requirements necessary in order to impose the death sentence. Your record of breaking and enterings goes back to 1974, and petty larceny goes back to '72. I see nothing in this record that would indicate that you would ever be rehabilitated. And I note that you had some nine violations while in prison under the 1974 conviction, including the possession of contraband.

Therefore, the Court affirms the sentencing of death imposed upon you on February 22nd, 1980, by a jury, and the Court orders that the transcript of all proceedings in this case, whether heard in this Division or previously in Division II, which have heretofore been made a part of the record in the proceeding, be made a part of the record here.

Mr. Clerk, I want the transcript of all

proceedings any time, any stage, made a part of the record in this case.

THE CLERK: Yes, sir.

THE COURT: Whether made by the defense attorneys or the Commonwealth's Attorneys.

THE CLERK: Yes, sir.

THE COURT: And the Court affirming the Judge's sentence of February 22nd, 1980, it is further the order and sentence of this Court that on or about May 29, 1980, you be transferred to the State Penitentiary at Richmond, Virginia, and that there, on Friday, June 13th, 1980, that you be electrocuted in the manner prescribed by law until you are dead.

Now, if in the meantime you file a petition for a writ of error, execution of said sentence shall be suspended and remain suspended until the Supreme Court shall have acted on your petition and the appeal provided by law.

Gentlemen, unless there is something further the Commonwealth can think of, the Court will stand adjourned.

MR. COWAN: Judge, just for the record, so that the record will be absolutely clear, we again move the Court to set aside the sentence

which the Court just rendered, for all of the reasons and all of the grounds heretofore stated.

THE COURT: Motion is overruled.

The Court will appoint counsel who represented the defendant faithfully, and against what I might call a massive, overwhelming case by the Commonwealth, to continue to represent him in his appeal.

MR. COWAN: We will do that, if Your Honor please.

NOTE: Court is adjourned at 10:16 o'clock a.m.

JURY OUT

evidence? The evidence is that they went out looking for somebody to rob and they did rob him. And there is a difference, I recognize, between felony murder and capital murder. But I think that this robbery was so interwoven in point of time, continuous action, that there was no break-off. There was never -- I would say maybe perhaps if one broke off and walked away and came back, say, got completely out of sight and the defendant could move somewhere in another direction and he came back later, that it might not be during the course of a robbery. But there was never a break-off in this whole thing.

And I would think it would be a travesty to let a defendant say, you didn't catch me firing a shot -- I am not saying that this is what this defendant says, but any defendant -- with one hand in the pocket of the victim and then, bang, all at the same time, you have got to get the picture of me doing them both.

I overrule the motion.

MR. COWAN: We respectfully object for the reasons stated. I would also like to say, Judge, that I don't think that my argument goes to that

JURY OUT

extreme. But we have made the point and we respectfully object.

THE COURT: Sure. You have got the point saved and if the Supreme Court says -- if it should ever get there and they say I was wrong, then we will know what the law is. But I think that the robbery is so interwoven that it is all a part and parcel of the same plan: the robbery, the abduction and the murder. They may not have planned the murder originally, but being armed with these guns didn't look like they were out for celebrating Halloween.

MR. COWAN: Our position is, and I have stated for the record and I don't want to repeat it, I would say that the robbery turned to an abduction which the Commonwealth could have pursued and they did not.

One other thing and I will be quiet. The evidence is that Mr. Gallaher died instantly, and so whatever taking of the car there was, in our judgment, it would not support a robbery.

THE COURT: Then you go back to the same thing, during the course of a robbery, but you mean one hand in the pocket and one hand firing

CRANE - SNEAD & ASSOCIATES, INC.
COURT REPORTERS
908 N. THOMPSON STREET
RICHMOND, VIRGINIA
PHONE 355-4335

JURY OUT

the gun. You can't shoot the man first and then rob him.

MR. COWAN: I think that is first, if you shoot the man, you can convict him of homicide but not capital murder.

Could we have a short recess?

MR. RICE: Could I make one brief statement?

THE COURT: Are you all trying the case with each other?

MR. RICE: No, but if Your Honor please, for the record, the cases I cited stood for the proposition when an offense occurred, not the felony murder.

MR. COWAN: They were related to the felony murder.

THE COURT: That is correct. The felony murder doctrine was just to cover situations like you have got right here, I think, but it may not be. You can never convince me that this statute doesn't mean you cannot kill a person, whether you did it with a bludgeon, a rapier, or by poison or lying in wait or any other way, and then go through his pockets and rob him, that you aren't

CRANE · SNEAD & ASSOCIATES, INC.
COURT REPORTERS
908 N. THOMPSON STREET
RICHMOND, VIRGINIA
PHONE 355-4335

JURY OUT

guilty under this statute.

MR. COWAN: We would also like to reiterate for the record all the other constitutional arguments we have made, restate them at this time.

THE COURT: Yes, sir. Court will recess.

NOTE: At this point, 11:15 o'clock a.m., recess is had until 11:43 o'clock a.m., whereupon the hearing resumes, viz:

MR. COWAN: May I get my co-counsel, if Your Honor please?

THE COURT: (Nodding affirmatively)

NOTE: Mr. Cowan leaves the courtroom momentarily and returns with Mr. Robinson and Mr. Beard.

MR. COWAN: Judge, before proceeding with the defense of the matter, there are certain points that I think should go on the record so it will be complete as far as the procedural matters are concerned.

This defendant has two brothers, James Briley and Anthony Briley, each of which is charged in this case, not with capital murder but with crimes associated with this case. Obviously they

INSTRUCTION NO. A

The Court instructs the jury that if you believe that the Commonwealth has failed to prove, beyond a reasonable doubt, all of the elements necessary to convict the defendant of capital murder, then you cannot find the defendant guilty of capital murder. However, if you believe the Commonwealth has proven beyond a reasonable doubt that the Defendant has proven that the defendant wilfully, deliberately, premeditatedly and maliciously killed Johnny Gallaher, you shall find him guilty of murder in the first degree and fix his punishment by confinement in the penitentiary for life, or for any term not less than 20 years.

See Inst 1, 5 & 10A

CRANE · SNEAD & ASSOCIATES, INC.
COURT REPORTERS
908 N. THOMPSON STREET
RICHMOND, VIRGINIA
PHONE 358-4335

IN CHAMBERS

thinking somebody would come out drunk and they could rob them. And from there on and until Gallaher was killed on Mayo Island, there was one continuous and continuing act which was an ongoing robbery. And with the idea of keeping any living witness from identifying them, to aid in their escape, they killed the man. And that is my view, Frank. I am sorry.

MR. COWAN: Judge --

THE COURT: I don't want any more on that. You take your exception.

MR. COWAN: Oh, I am not going to argue any more, but I need to clarify something. We respectfully object for all of the reasons stated to the Court not submitting the theory, previously outlined, to the jury and not giving the jury instructions covering the issues raised by the defendant. We respectfully object to the ruling of the Court.

Now, Judge, I would like to raise another question. It would be my intention to argue before the jury that the Commonwealth has not proved a homicide during the commission of a robbery. And I would make, in essence, the same arguments that I

CRANE - SNEAD & ASSOCIATES, INC.
COURT REPORTERS
908 N. THOMPSON STREET
RICHMOND, VIRGINIA
PHONE 355-4335

IN CHAMBERS

said that it never happened and Meekins said that the victim was in their custody and under their control from the minute they jumped over the bushes and accosted him while he was relieving himself at the Log Cabin until he was dragged out of the car and shot. Now, if they are the facts, you and I didn't make them.

MR. COWAN: But are you ruling as a matter of law?

THE COURT: That the robbery doesn't get over with under those circumstances, right, period.

MR. COWAN: We respectfully object to the ruling of the Court for all of the reasons I have stated.

THE COURT: Sure.

MR. COWAN: Not only now, but on the motion to strike. And, Judge, I am not going to argue to the jury contrary to the instructions of the Court. I would have argued contrary; I am not going to do that now. I think that is highly prejudicial to my client, but I don't have any choice.

Now I would like to submit to the Court —

INSTRUCTION NO 6

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed John Harvey Gallagher; and

(2) That the killing was willful, deliberate and premeditated;

(3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty of capital murder.

INSTRUCTION NO. 10A

Robbery is an element of the offense of Capital Murder for which the defendant is charged. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That the defendant intended to steal; and
2. That United States currency and property was taken; and
3. That the taking was from John Harvey Gallagher or in is presence; and
4. That the taking was against the will of the owner or possessor; and
5. That the taking was accomplished by violence or threat of bodily harm.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense of robbery, then you shall find that a robbery did occur.

INSTRUCTION NO. 11

The Court further instructs the jury that the proper form of verdicts in this case is as follows:

(1) GUILTY OF CAPITAL MURDER

We, the jury, find the defendant, Lynwood Earl Briley, guilty of the capital murder of John Harvey Gallagher, during the commission of a robbery, while armed with a deadly weapon, as charged in the indictment.

Charles L. Bibb 2-21-80
Foreman

(2) NOT GUILTY

We, the jury, find the defendant not guilty.

Foreman

IN CHAMBERS

THE COURT: You have got plenty of room on these. These are the only three you want?

MR. COWAN: Excuse me one more second.

THE COURT: Oh, excuse me.

MR. COWAN: On that same No. 1, I object to the instruction as the Court proposes to give it on the basis that it does not include a provision which says the burden is upon the Commonwealth to exclude every reasonable hypothesis of innocence.

THE COURT: I will not give that under any circumstances. I never give that one using the word "hypothesis" for the good reason that I have had some recent jurors come back and say, what does a hypothesis mean?

MR. COWAN: We respectfully object to that.

~~THE COURT: Yes, sir.~~

MR. COWAN: If Your Honor please, I object to Instruction No. 6 on the same theory that I have previously advanced, that there should be a provision for lesser-included or a lesser-included offense.

Judge, I object to Instruction No. 10 on the basis that it is confusing. I think it is

IN CHAMBERS

not a proper definition of robbery.

THE COURT: (Handing an instruction to Mr. Cowan) See, I helped you that time. I told you which other one you wanted here.

MR. COWAN: 10-A, I think instead of commenting, I think the instruction of the Court should simply define robbery which, under Mason versus Commonwealth -- I think it is in 212 Virginia -- the essence of it is that robbery is the taking of personal property from another or in his presence with the intent to steal by force or intimidation.

I think that Instruction 10-A -- I object to it for the same reasons that it does not reflect the theory of the defendant as to lesser-included offenses.

Judge, I object to the form of verdict on the basis that it does not reflect the theory that we previously advanced about lesser-included offenses.

Judge, I don't feel that the Commonwealth has given an adequate burden of proof instruction and I would submit my burden of proof instruction.

THE COURT: Which is the old one?

IN CHAMBERS

MR. COWAN: Out of Judge Doubles' book.

THE COURT: I got beat over the head with that when I came on the bench worse than any other Judge in the state because I succeeded him and the book was new.

MR. COWAN: I don't see where the Commonwealth has really got a burden of proof instruction.

MR. VON SCHUCH: It is combined.

THE COURT: (Referring to instruction) You will find the defendant not guilty unless the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense.

MR. COWAN: Judge, we respectfully --

THE COURT: Wait a minute. Let me see -- A, B, C, D. (Referring to instructions) All right.

MR. COWAN: We respectfully object to the refusal to give Instructions A, B, C and D for the reasons stated. And I have one more on the presumption of innocence.

THE COURT: (Reading instruction) The defendant is presumed to be innocent of the offense with which he is charged and this presumption of innocence goes with him through the entire case

IN CHAMBERS

and applies at every stage thereof -- All right. That is refused.

MR. COWAN: Judge, I would like to tender this instruction. (Handing another instruction to the Court) Let me make one change. The reason I tender Instruction No. F is that it specifically refers to the Commonwealth having to prove the commission of robbery and then it specifically refers to a proposed instruction which would define robbery.

THE COURT: Which would get back to your theory that the robbery was completed?

MR. COWAN: That is correct. May I ask one other favor and I will leave you alone. I had dictated a simple robbery definition.

THE COURT: Do you want to offer it later?

MR. COWAN: I will offer it later. All I am going to do is take it right out of the book.

Before the jury comes in, would you let me make what few motions I have to make in Court?

THE COURT: Yes.

NOTE: At this point, the Court and counsel return to the courtroom, whereupon the hearing resumes, viz:

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 800690

COMMONWEALTH OF VIRGINIA, Appellee,

v.

LINWOOD EARL BRILEY, Appellant.

ASSIGNMENTS OF ERROR

Comes now the defendant, by counsel, and makes the following Assignments of Error regarding the matters involved herein:

1. The trial court erred in failing to sustain the defendant's motion to dismiss so much of Indictment No. F80-229 as charged the defendant with capital murder. The defendant's Motion was based upon the grounds that the applicable Virginia Statutes violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, and Article One, Section 11 of the Constitution of Virginia.

2. The trial court erred in refusing to grant the motion of the defendant to continue the trial of the case.

3. The trial court erred in refusing to grant the defendant's motion for a change of venue.

4. The trial court erred in failing to strike for cause veniremen who testified on voir dire that they had formed opinions.

5. The trial court erred in refusing to grant the defendant's motion for change of venue after it was apparent that a substantial number of the veniremen had read in newspapers and seen on television accounts of multiple trial and charges against the defendant and his brothers.

6. The Court erred in striking for cause venireman Leroy A. Richardson.

7. The trial court erred in failing to sustain the motion of the defendant to dismiss the indictment on the grounds that the exclusive jurisdiction for the trial of the charges involved rests with the Circuit Court of the City of Richmond, Division II.

8. The trial court erred in failing to rule as a matter of law, as requested by the defendant, that the Commonwealth had failed to prove the charge against the defendant of capital murder, and in refusing to submit to the jury, as requested by the defendant, only the issue of whether the defendant was guilty of murder in the first degree.

9. The trial court erred in ruling as a matter of law that the homicide in question occurred during the commission of robbery, in refusing to permit counsel for the defendant to argue to the jury that the homicide in question did not occur in the commission of robbery and in refusing to submit to the jury the defendant's theory that the homicide in question did not occur in the commission of the offense of robbery.

10. The trial court erred in ruling that counsel for the defendant could not fully cross examine Duncan Meekins about his plea agreement with the Commonwealth without opening the door for the Commonwealth to prove facts relative to other crimes, charges and convictions pertaining to the defendant.

11. The trial court erred in failing to sustain the defendant's position that to permit the Commonwealth to prove cumulative felony convictions by the defendant was a denial of due process of law.

12. The trial court erred when it instructed the jury (Instructions number 6 and 10A) that the jury must find the defendant guilty of capital murder or acquit him. The instructions to the jury should have contained, as requested by the defendant, a lesser included offense theory whereby the jury could have found the defendant not guilty of capital murder but guilty of first degree murder.

13. The trial court erred in giving Instruction number 1.

14. The trial court erred in giving Instruction number 10.

15. The trial court erred in refusing Instruction A tendered by the defendant.

16. The trial court erred in refusing Instruction number B tendered by the defendant.

17. The trial court erred in refusing Instruction number C tendered by the defendant.

18. The trial court erred in refusing Instruction number D tendered by the defendant.

19. The trial court erred in refusing Instruction number E tendered by the defendant.

20. The trial court erred in refusing Instruction number F tendered by the defendant.

21. The trial court erred in refusing Instruction number G tendered by the defendant.

22. The trial court erred in giving the jury a verdict form which failed to permit the jury to find the defendant guilty of first degree murder and not capital murder.

23. The trial court erred in refusing to give Instruction number A-1 offered by the defendant.

24. The trial court erred in refusing to give Instruction number A-2 offered by the defendant.

25. The trial court erred in permitting the Commonwealth to prove and submit to the jury for consideration in the punishment phase of the case, fourteen felony convictions which were on appeal to the Virginia Supreme Court.

26. The trial court erred in refusing to permit counsel for the defendant to argue to the jury that fourteen felony convictions of the defendant were on appeal to the Virginia Supreme Court and that the jury should consider this in its deliberations.

27. The trial court erred in permitting the Commonwealth to cross examine the defendant on fourteen felony convictions that are on appeal to the Virginia Supreme Court and in instructing the jury that such convictions were a verity until reversed by another court.

28. The trial court erred in failing to set aside the jury verdict and grant the defendant a new trial on the grounds that under the totality of the circumstances the defendant was denied due process of law.

29. The death sentence was imposed upon the influence of passion, prejudice or other arbitrary factor, and the sentence was excessive or disproportionate to the penalty imposed in similar cases.

LINWOOD EARL BRILEY

By: Frank N. Cowan
Counsel

Frank N. Cowan
COWAN, OWEN & NANCE
1901 Huguenot Road
P. O. Box 3347
Richmond, Virginia 23235

Charles L. Beard
200 North 4th Street
Richmond, Virginia 23219

Bruce E. Robinson
1308 Hull Street
Richmond, Virginia 23224

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Assignments of Error was mailed, postage prepaid, to Mr. Terrell Don Hutto, Director, Department of Corrections, 22 East Cary Street, Richmond, Virginia 23219; The Honorable Marshall Coleman, Attorney General of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219, this 19th day of May, 1980.

Frank N. Cowan
Frank N. Cowan

RECEIVED
MAR 19 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

LINWOOD EARL BRILEY, Petitioner

v.

COMMONWEALTH OF VIRGINIA

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The petitioner, Linwood Earl Briley, who is now held in a Virginia State Penitentiary, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 .

The petitioner's affidavit in support of this motion is attached hereto.

Frank N. Cowan

Frank N. Cowan
Counsel for Petitioner
COWAN, OWEN & NANCE
P. O. Box 3205
Richmond, Virginia 23235

80-6367

MAR 19 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

LINWOOD EARL BRILEY, Petitioner

v.

COMMONWEALTH OF VIRGINIA

AFFIDAVIT

I, Linwood Earl Briley, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the petitioner in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

I was sentenced to death by the Circuit Court of the City of Richmond, Division I, on a charge of capital murder. This sentence was affirmed by the Supreme Court of Virginia. The present proceeding was commenced on a petition to vacate the sentence, as permitted by 28 U.S.C.§1257 (3), on the ground that the Virginia capital punishment statutes are unconstitutional; and that the trial court violated my rights to due process of law in limiting the cross-examination of the chief witness against me;

refusing to instruct on lesser included offenses and failing to grant a change of venue.

Linwood Earl Briley

Linwood Earl Briley

STATE OF VIRGINIA

AT LARGE, to-wit:

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that Linwood Earl Briley, whose name is signed to the foregoing Affidavit dated February 18 1981, has acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand on this 18 day of February 1981.

My Commission expires: 9-24-84

RECEIVED
MAY 4 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-6367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

LINWOOD EARL BRILEY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

Marshall Coleman
Attorney General of Virginia

James E. Kulp
Deputy Attorney General
Counsel of Record for Respondent

Office of the Attorney General
900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219

(804) 786-6563

QUESTIONS PRESENTED FOR REVIEW

1. ARE THE VIRGINIA STATUTES WHICH PROVIDE THAT MURDER WHICH OCCURS DURING THE COMMISSION OF A ROBBERY CAN BE CAPITAL MURDER OR FIRST DEGREE MURDER AN UNCONSTITUTIONAL VIOLATION OF A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW BECAUSE THEY FAIL TO PROVIDE A MEANINGFUL BASIS TO DISTINGUISH BETWEEN THE FEW CASES IN WHICH CAPITAL PUNISHMENT IS INVOKED AND THE MANY IN WHICH IT IS NOT?

2. IS THE FAILURE TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION IN A CAPITAL MURDER CASE A VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

QUESTIONS PRESENTED FOR REVIEW

1. ARE THE VIRGINIA STATUTES WHICH PROVIDE THAT MURDER WHICH OCCURS DURING THE COMMISSION OF A ROBBERY CAN BE CAPITAL MURDER OR FIRST DEGREE MURDER AN UNCONSTITUTIONAL VIOLATION OF A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW BECAUSE THEY FAIL TO PROVIDE A MEANINGFUL BASIS TO DISTINGUISH BETWEEN THE FEW CASES IN WHICH CAPITAL PUNISHMENT IS INVOKED AND THE MANY IN WHICH IT IS NOT?

2. IS THE FAILURE TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION IN A CAPITAL MURDER CASE A VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

ARGUMENT AGAINST GRANTING CERTIORARI

I. The Virginia Capital Punishment Statutes Are Constitutional..... 1

II. Instructions On Lesser Included Offenses In Capital Cases Are Not Required Absent Supporting Evidence..... 4

CONCLUSION..... 5

CERTIFICATE OF SERVICE..... 6

TABLE OF CITATIONS

Cases	Page
Ball v. Commonwealth, 221 Va. ___, 273 S.E.2d 790 (1981)	2
Beck v. Alabama, ___U.S.___, 100 S. Ct. 2382 (1980)	4
Bizup v. People, 371 P.2d 786 (Colo.(1962)	5
Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied 444 U.S. 1049 (1980)	1
Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979) cert. denied 444 U.S. 1103 (1980)	1
Gregg v. Georgia, 428 U.S. 153 (1976)	2,3
Jurek v. Texas, 428 U.S. 262 (1976)	2,3
Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979)	1
People v. Ketchel, 538 P.2d 394 (Cal. 1963)	5
Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978) cert. denied 441 U.S. 967 (1979)	1
Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979) cert. denied ___U.S.___100 S. Ct. 1666 (1980)	1
State v. Harley, 543 S.W.2d 288 (1976)	5
Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, cert. denied, 442 U.S. 924 (1979)	1

ARGUMENT AGAINST GRANTING CERTIORARI

I.

THE VIRGINIA CAPITAL PUNISHMENT STATUTES ARE CONSTITUTIONAL

This Court has had numerous occasions to consider the constitutionality of Virginia's capital punishment statutes, and in each instance has refused to grant certiorari. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, cert. denied, 442 U.S. 924 (1979); Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1980); Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103 (1980); and Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, ___U.S.___, 100 S. Ct. 1666 (1980). The respondent believes that if this Court has not deemed it necessary to review the constitutionality of Virginia's capital punishment statutes in any of the cited cases, no reason exists in the present case for doing so.

In the present case Petitioner asserts that there exist no statutory guidelines for determining whether murder in the commission of robbery is capital murder under § 18.2-31(d) or first degree murder under § 18.2-32. A cursory review of the two statutes clearly illustrates the difference between them.

In order to commit the capital offense of murder in the commission of robbery under § 18.2-31(d), the murder must have been willful, deliberate and premeditated. Whereas murder in the first degree under § 18.2-32 may be shown if the homicide occurred in the commission of or attempt to commit robbery. This is the common felony-murder rule where the element of legal malice is supplied from the commission of the felony. There is no requirement under § 18.2-32 that such felony-murder must have been willful, deliberate and premeditated as is required in the capital offense. This distinction has been clearly recognized by the Virginia Supreme Court in the case of Ball v. Commonwealth, 221 Va. ____, 273 S.E.2d 790 (1981), cited by Petitioner.

The Petitioner also asserts that the Virginia capital punishment scheme is unconstitutional in that it permits only the "trigger man" or principal in the first degree, except in cases of murder for hire, to be convicted of capital murder. See, § 18.2-18. Petitioner appears to urge that everyone, no matter how remotely connected to the murder, must be subject to capital punishment. Such a position flies in the face of the holdings in this Court. In both Gregg v. Georgia, 428 U.S. 153 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), this Court noted that Georgia and Texas had acted to narrow the class of murderers subject to capital punishment. The Commonwealth of Virginia has reserved the possibility of

capital punishment only for those who actually commit the murder. Those who are merely functionaries in the crime, but who under normal principles of criminal law would be treated in the same manner as the principal in the first degree, are not subject to capital punishment. It would appear that Petitioner is condemning the Commonwealth for her refusal to cast the capital punishment not so broadly as to ensnare the hapless lookout. An analogous argument has been rejected in Gregg, supra, wherein this Court noted that it would be totally alien to our notions of criminal justice to require prosecuting authorities to charge a capital offense whenever arguably there had been a capital offense. 428 U.S. at 199 n. 50.

The Petitioner also maintains that Virginia's capital punishment statutes are arbitrary, capricious and illogical since capital punishment is not provided for in cases of homicides committed during burglaries, sodomy and like offenses. Respondent submits that this argument is foreclosed by Gregg and Jurek. Section 18.2-31 is patterned after the Texas capital punishment statute upheld in Jurek. The Virginia statute limits the imposition of the death penalty to a narrowly defined group of the most brutal crimes, and this Court has never suggested that the death penalty must be available for all murders. Such questions are clearly within the province of the legislative branch of government.

II.

INSTRUCTIONS ON LESSER INCLUDED OFFENSES IN CAPITAL CASES ARE NOT REQUIRED ABSENT SUPPORTING EVIDENCE.

Neither the Virginia capital punishment statutes nor case law prohibit the giving of an instruction on lesser included offenses in capital cases. Virginia law is very clear, however, that instructions must be supported by the evidence. This case, therefore, does not present the situation where a trial court is prohibited from giving an instruction on lesser included offenses which this Court found to be impermissible in Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382 (1980).

In the present case the Petitioner denied all complicity in both the robbery and the killing. Beck does not require that instructions on lesser included offenses be given. Rather Beck supports the principle that instructions on lesser included offenses are required only when the evidence would support such an instruction. In the opinion this Court noted that in federal courts as well as state courts a defendant is entitled to an instruction on a lesser included offense where the evidence warrants it. Nowhere in the opinion does this Court suggest that such instructions must be given when not supported by the evidence. In Beck, the State of Alabama conceded that except for the statutory prohibition the evidence would have supported the giving

of an instruction on a lesser included offense. See, footnote 5.

The Petitioner argues that the Virginia Supreme Court assumed the role of fact finder when it upheld the trial court's determination that if the jury believed the Petitioner robbed the victim at the Log Cabin, then, as a matter of law, the robbery continued until the murder on Mayo Island. The facts in this case established that no more than 15 to 20 minutes elapsed from the time the victim was seized at the Log Cabin until he was shot on Mayo Island. The uncontradicted evidence in this case established that the robbery and murder were part of one continuous episode. See, People v. Ketchel, 538 P.2d 394 (Cal. 1963); Bizup v. People, 371 P.2d 786 (Colo. 1962); State v. Harley, 543 S.W.2d 288 (1976).

CONCLUSION

For the reasons stated, Respondent respectfully submits that the Petition should be denied.

Respectfully submitted,

Marshall Coleman
Attorney General of Virginia

James E. Kulp
Deputy Attorney General
Counsel of Record

Office of the Attorney General
900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219
(804) 786-6563